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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

H4

[Redacted]

FILE:

[Redacted]

Office: SANTA ANA, CA

Date: **SEP 13 2010**

IN RE:

[Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

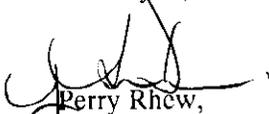
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew,  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Santa Ana, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on January 6, 1996, was apprehended by immigration officers. The applicant failed to provide his true identity to immigration officers. The applicant was returned to Mexico under the name [REDACTED]

On December 24, 1996, immigration officers apprehended the applicant. The applicant failed to provide his true identity to immigration officers. The applicant was returned to Mexico under the name [REDACTED]

On December 27, 1996, immigration officers apprehended the applicant. The applicant failed to provide his true identity to immigration officers. The applicant was returned to Mexico under the name [REDACTED]

On July 28, 2001, immigration officers apprehended the applicant. The applicant failed to provide his true identity to immigration officers by altering his date of birth. The applicant was returned to Mexico.

On August 15, 2001, the applicant appeared at the San Ysidro, California port of entry. The applicant presented an I-586 border crossing card bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he had no valid documentation to enter the United States. The applicant admitted that he knew it was illegal to attempt to enter the United States by presenting the document. The applicant admitted that he had resided in the United States for 17 years. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. On August 16, 2001, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

On August 18, 2001, the applicant attempted to elude inspection by concealing himself in the trunk of a vehicle at the San Ysidro, California port of entry. The applicant was placed into secondary inspection. The applicant admitted that he had no valid documentation to enter the United States. The applicant admitted that he had been previously removed from the United States. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Act for being an immigrant without valid documentation. On August 18, 2001, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act.

On July 19, 2006, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his naturalized U.S. citizen spouse. The Form I-485 indicates that the applicant entered the United States without inspection on August 15, 2001. On the same day, the applicant filed the Form I-212. During an interview in regard to the Form I-485 the applicant admitted that he last entered the United States without inspection. On October 6, 2006, the Form I-212 was denied. The applicant filed a motion to reopen the Form I-212, which was granted. On August 1, 2007, the applicant filed an Application for

Waiver of Grounds of Inadmissibility (Form I-601), indicating that he continued to reside in the United States. On August 4, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) for a period of twenty years. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to remain in the United States and reside with his naturalized U.S. citizen spouse, three U.S. citizen children and four U.S. citizen stepchildren.

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated August 4, 2009.

On appeal, counsel contends that *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004), was controlling law at the time the applicant filed his Form I-212 and that the applicant should have had his application adjudicated on the merits based upon this case law.<sup>1</sup> Counsel contends that, in spite of the holding in *Perez*, the field office director, without justification, failed to adjudicate the Form I-212 for a period of three years, during which time the case law changed.<sup>2</sup> *See Form I-290B*, dated August 31, 2009. In support of his contentions, counsel submits only the referenced Form I-290B. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or ***within 20 years in the case of a second or subsequent removal*** or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

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<sup>1</sup> Counsel's contention is unpersuasive. In 2007, the Ninth Circuit Court of Appeals (Ninth Circuit) found that *Perez-Gonzalez* should be overturned and that the Ninth Circuit should defer to the Board of Immigration Appeals' (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007). Furthermore, retroactivity arguments before the Ninth Circuit in regard to *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9<sup>th</sup> Cir. 2010).

<sup>2</sup> The applicant's Form I-212 was pending while an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia* had been issued. As such, the field office director correctly complied with an injunction in the Ninth Circuit by delaying the adjudication of the applicant's Form I-212 until a decision had been rendered in *Gonzales II*.

- (I) has been ordered removed under section 240 or any other provision of law, or
  - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary of Homeland Security] has consented to the alien's reapplying for admission. [emphasis added]

....  
(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

- (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
- (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

- (I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The AAO notes that a waiver to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. While the applicant's last departure from the United States occurred on August 18, 2001, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.<sup>3</sup> The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.

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<sup>3</sup> The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.